ABSTRACTS

[Editor's note: The abstracts section is a new feature of the *Journal.* It contains summaries of recent articles, comments and notes discussing alternative forms of dispute resolution published in law journals not specializing in ADR. In addition, the section lists citations to recent articles of interest that are not summarized.]

Carlton J. Snow, *An Arbitrator's Use of Precedent*, 94 DICK. L. REV. 665-720 (1990). Arbitrators, not judges, should have the responsibility of deciding the precedential value of previous arbitration awards in grievance arbitrations of labor disputes. Snow discusses res judicata, collateral estoppel, and stare decisis and their implications in an arbitration context. The author argues that where one party to a prior proceeding requests reconsideration, the prior award should be binding if there was a full and fair initial hearing. He next argues that prior awards construing the same collective bargaining agreement should be binding because they promote stability. Snow points out that precluding consideration of claims and issues that could or should have arisen in a prior hearing promotes efficiency and justice. He also contends that a settlement agreement should be carefully examined before operating as a bar to a subsequent arbitration. The author points out that a prior award may be binding either only during the term of the labor contract or that it may have precedential value until the agreement is changed. Snow encourages applying the later approach under a "readoption" theory. The author next examines the three tests used by the courts in actions to enforce a prior award in a new dispute: the "substantial identity" test, the "material factual identity" test, and the "particularly egregious circumstances" test. Snow also explores the approaches used by courts in actions to vacate arbitration awards and to enjoin arbitration. The author endorses the Supreme Court's approach as channelling courts in their appropriate institutional roles and recognizing the importance and effectiveness of labor-management arbitration. Snow concludes that use of arbitral precedent can promote stability, certainty and a reasonable degree of predictability.

G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509-73 (1990). This article addresses the issue of when federal employment rights should be subject to commercial arbitration under the Federal Arbitration Act (FAA). Shell notes the Supreme Court's disapproval of labor arbitration and approval of commercial arbitration as

applied to issues of statutory law. The author then discusses his view of the proper role of statutory law in the arbitration decision-making process. He points out that employment statutes such as the Employee Retirement Income Security Act (ERISA), among others, mix the commercial and labor arbitration models, thus posing difficult interpretation problems for the courts in deciding whether claims under such statutes are subject to arbitration. Shell gives background information on the labor arbitration process under the Labor Management Relations Act (LMRA), and then describes commercial arbitration under the FAA. The author discusses how commercial arbitration differs from labor arbitration, and he then describes the interaction of ERISA with the arbitration process. Shell concludes that Congress intended all ERISA claims to be arbitrable under the FAA. He then discusses arbitration under other federal employment statutes, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Fair Labor Standards Act (FLSA). Shell argues that Congress intended FLSA claims, but not Title VII or ADEA claims, to be subject to FAA arbitration. Thus, the author concludes that commercial arbitration under the FAA, but not labor arbitration under the LMRA, may be a substitute for traditional litigation in resolving ERISA and FLSA claims. Such arbitration is not an adequate substitute for Title VII or ADEA claims.

William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647-709 (1989). An emerging trend in international contract dispute arbitration is to limit the grounds for challenging such arbitration awards when neither party is a citizen of the country of the arbitral situs. For example, Belgium has gone so far as to eliminate the right to challenge arbitration awards when neither party is Belgian. Park argues that this trend is dangerous in light of the fact that many international arbitrators have taken to using the unauthorized powers of amiable composition. Park further argues that amiable composition, the power to decide disputes without reference to any set legal system, has led to three points of concern. The first relates to choice of law. Park points out that arbitrators are more likely to use elements of trade usage rather than apply the strict letter of the law. The second area implicated, enforcement of arbitration agreements, has led to arbitration in areas that were not explicitly provided for in arbitration agreements. The third area discussed is the delocalization of arbitration. Park argues that delocalization, whereby arbitrations are freed from the norms of the arbitral situs, will lead arbitrators to exceed their proper authority. Park concludes that eliminating grounds for challenge of arbitration awards is an undesirable trend. He urges that the arbitral situs should provide for a non-waivable right to challenge an

arbitration award when the arbitrator disregards either his mission or fundamental due process.

Michael H. Strub, Jr., *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal For Effective Guidelines*, 68 TEX. L. REV. 1031-71 (1990). In the United States, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) governs the recognition of agreements to arbitrate international commercial disputes and the enforcement of foreign arbitral awards. The New York Convention's article V(1)(e) and article VI cover some grounds for nonenforcement of arbitral awards either by refusal or by staying enforcement. The author contends that, in the application of both article V(1)(e) and article VI, few standards currently exist to govern the discretion of domestic courts and the standards that do exist are inadequate. He traces the evolution of American judicial perceptions from hostility toward the arbitral process to acceptance and enforcement of foreign arbitral awards. The author explores the enforcement of these awards under American law and discusses the difficulty parties have traditionally had in seeking to enforce an award in one country after it has been rendered in another country. In addition, Strub explores the approaches that courts have used in deciding whether an award is binding. He suggests that courts should focus their inquiry on the intent of the parties to be bound by the decision of the arbitrators. The author proposes four standards that a court could adopt for deciding whether to stay enforcement of a foreign arbitral award. Strub argues that the best possible standard of interpretation for article VI would be for courts to use an analysis similar to that used for appeals from a judgment granting or denying an injunction because this approach considers all parties' concerns and gives them the proper weight.

Perry E. Wallace, Jr., *Securities Arbitration After McMahon, Rodriguez, and the New Rules: Can Investor's Rights Really Be Protected?*, 43 VAND. L. REV. 1199-1251 (1990). The securities arbitration system needs a fair, efficient and economical process. The author discusses ideas such as effective discharge of mandatory arbitration clauses and choices of forum are intended to contribute to the development of such a system. Wallace discusses the history of arbitration in the security industry as the Securities Act was interpreted by Federal courts and notes that securities arbitration is now a favored device for resolving disputes between broker-dealers and their customers (small investors). This is due to several United States Supreme Court decisions such as Rodriguez de Quijas v. Shearson/American Express, Inc. Since this decision and others, he comments, the arbitral forum has

become the likely, and sometimes the mandated location of deliberative proceedings of such conflicts. Wallace stated that the new arbitration rules such as substantial improvements with respect to the prehearing phase, prehearing decisions by an arbitrator when necessary, and means of handling information requests, provide a significantly improved regime that is capable of creating this fair, efficient and economical process. The author outlines these rules and discusses their requirements. He believes the adoption of these rules, which provide significant protections in the form of prominent disclosure requirements, will benefit investors and the capital markets. Wallace feels that even these rules can be improved. He discusses issues that are crucial to the improvement of arbitration procedures and their administration and then suggests specific recommendations. The recommendations focus on:

(1) the need, in certain circumstances, for a prohibition against mandatory arbitration clauses;
(2) it is desirable to allow investors to choose to arbitrate before the American Arbitration Association instead of allowing brokerage firms to exclude the AAA among forum options;
(3) the need for additional protections against arbitrator conflicts of interest, and
(4) the need to develop rules governing the conduct of complex cases, including the referral of cases to the courts.

Wallace suggests that even with these recommendations, it is necessary that the industry, the SEC, and the public continue to monitor and evaluate the securities arbitration process in order to continue striving for the most fair, efficient and economical process.

Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87-116 (1990). Wiegand presents an overview and analysis of the summary jury trial (SJT) and concludes that there is a place for the procedure, but not as it is currently carried out. Wiegand provides an historical overview of the process. She then critiques three basic assumptions commonly presented as justifications for SJTs: (1) the litigation explosion requires use of ADR proceedings, (2) settlement is good, and (3) SJTs can solve the problem. She presents information to challenge each assumption and finds in sufficient justification to support SJTs. She next states that no basis exists in statutory or common law for the SJT. Specifically, she asserts that Federal Rules of Civil Procedure 1, 16, 39 and 83 do not provide a legal basis for the procedure. She asserts, therefore, that the courts do not have the inherent

power to impose a procedure inconsistent with the Federal Rules. Because she finds no basis for the SJT in the law, Wiegand objects to the use of public facilities, public judges, and public funds for jurors. Moreover, she argues that the quality of justice and constitutional rights are threatened by the mandatory use of SJTs. In conclusion, Wiegand asserts that there is a place for the SJT, but argues that it is outside the courtroom, privately funded, and not mandated. Wiegand sees the SJT as another of several dispute resolution techniques that parties should be free to choose in settling their disputes. She argues that the decision and the cost should be left to the litigants, however, and not incorporated into the public system nor mandated.

David B. Shapiro, *Private Judging in the State of New York: A Critical Introduction*, 23 COLUM. J. L. & SOC. PROBS. 275-315 (1990). An increase in the number of lawsuits being filed is hampering the efficient administration of the judicial system, resulting in undue delay and expense. Shapiro identifies private judging as a timely and cost effective alternative to both traditional litigation and arbitration. The author defines private judging as a procedure in which litigants consent to have their case heard by a referee and stipulate to (1) the referee, (2) the issues to be resolved, (3) the fee arrangement, and (4) the time and place for reference. Shapiro's discussion focuses on New York's experience with its private judging statute and the implications of this experience for other states. He provides an historical overview of New York's private judging statute, contending that it originated more from a distrust of city judges than as a means of lightening court dockets. The author then explores the procedural aspects of the private judging statute and the broad jurisdiction this statute confers on referees. He observes that in comparison to private judging statutes of other states, the New York statute allows referees considerably more latitude in the scope of issues they may consider and the weight accorded to these decisions. Shapiro then concludes that a private judging system is beneficial to the litigants and to the overall well-being of the judicial system. He suggests that such a system will stimulate faster and less costly decisions while providing the litigants with an opportunity to select a referee with the appropriate expertise to resolve the issues in question. The focus of the discussion then shifts to the constitutional concerns generated by private judging. The author contends that not only are constitutional criticisms unwarranted, but that private judging is compatible with general tenets of public policy. Accordingly, Shapiro suggests that private judging statutes represent a worthwhile alternative to traditional litigation and that other states can profit from the adoption of statutes similar to the one currently in use in New York.

Leroy J. Tornquist, *The Active Judge in Pre-Trial Settlement; Inherent Authority Gone Away*, 39 DEF. L. J. 307-38 (1990). The role of the federal judge in pretrial settlement is set forth in the vague guidelines of Rule 16 of the Federal Rules of Civil Procedure. The author discusses the effect of active judicial involvement on traditional theories of adjudication, as well as the costs and benefits of active judicial involvement in civil case settlement. Tornquist starts by discussing the various roles of a trial judge in the pretrial conference stage of a civil case. The author explores the efforts of active judges and the effects of judicial intrusion on the quality, timing and quantity of settlements. By comparing various studies, the author argues that there is not a positive relationship between settlement conferences including an active judge and the number of pretrial settlements actually obtained. Tornquist also states that there is little evidence to support the theory that active pretrial judges improve the timing or quality of the resolution of the dispute. The author expresses his concern in the overall fairness of the settlement due to the fact that the more committed the judge becomes to the settlement, the more difficult it becomes for the judge to find the settlement unfair to one or both of the parties. It is further argued by the author that because of the ad hoc nature of the judicial involvement, procedural unfairness may abound. The author concludes by suggesting that Rule 16 could be amended to thoroughly delineate the role of the judge in the pretrial settlement process.

Robert Geffner and Mildred Daley Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151-59 (1990). Joint custody should not be automatically granted and mediation should not be court mandated in child custody cases without first considering evidence of spouse abuse. Failure to consider such evidence, the authors contend, will perpetuate the "intergenerational transmission of violence." They report that observing spouse abuse increases the probability that the children themselves will be spouse abusers. According to the authors, joint custody and mediation have increased the opportunities for children to witness incidents of abuse. The contact between ex-spouses that joint custody arrangements require provides abuse opportunities involving children, at least as observers. Geffner and Pagelow also contend that mediation may foster and legitimize the abusive conduct. They state that abusive ex-spouses tend to control mediation proceedings by either forceful demeanor or intimidation of the abused ex-spouse. The authors also find that mediation is not an ideal forum because information disclosed during mediation may be used at a later trial. Furthermore, mediators may exert pressure for a quick resolution by encouraging the least resistant party to acquiesce to the dominant party's demands. The authors observe that, through mediation, the abusive ex-spouse receives at least joint custody with the court's blessings. Finally, the

authors concede that mediation will work for abusive relationships with the consent of both parties, with a mediator trained in family violence, with power balancing methods, and with a parallel abuser therapy program.

Additional Articles of Interest

Bruce, *An Attorney's Duty to Exercise Ordinary Skill and Knowledge in the Conduct of Settlement Negotiations*, 35 Vill. L. Rev. 435 (1990).

Brunel, *A Proposal to Adopt UNCITRAL's Model Law on International Commercial Arbitration as Federal Law*, 25 Tex. Int'l L.J. 43 (1990).

Fitzgibbon, *The Judicial Itch*, 34 St. Louis U.L.J. 485 (1990).

Hermann, *Arbitration of Securities Disputes: Rodriguez and the New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 Ind. L.J. 697 (1990).

Richardson, *The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediator*, 17 Fla. St. U.L. Rev. 623 (1990).

Shafer, *Arbitration Gets the Green Light as the Death Blow is Struck*, 15 J. Contemp. Legal Issues 339 (1990).

Note, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees?*, 35 Vill. L. Rev. 389 (1990).